IN THE

Supreme Court of the United States

No. 22.

OCTOBER TERM, A. D. 1924.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Appellant,
vs.
NATHAN E. KENDALL, GOVERNOR OF THE STATE,
ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF FOR APPELLANT.

CLIFFORD V. COX,
WM. F. RILEY,
DONALD EVANS,
Solicitors for Appellant.

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AUTHORITIES.

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STATEMENT.

This action was brought to enjoin the certification by the Executive Council of the State of Iowa of the assessment for taxation made by it of Complainant's property within the State, on the ground that the same is illegal because discriminatory, in violation of Section 6 of Article I and Section 2 of Article VIII of the Constitution of Iowa, and also in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which prohibits the States from denying to any person the equal protection of the law.

An Application for Preliminary Injunction was heard by a Court organized under the provisions of Chapter 266 of the Judicial Code, and by it denied. This appeal is from that order.

The Complainant, the Chicago Great Western Railroad Company a citizen of Illinois, owns and operates a system of railway extending into and through the State of Iowa. Its total mileage operated is approximately 1,496 miles, 769.176 of which is located within that State. It is a single track railway, owning no terminals in any of the gateways of Chicago, the Twin Cities, Omaha and Kansas City, to which it runs, except small freight terminals in the city of Minneapolis. In these terminals it is required to operate over leased lines, and to reach Kansas City it is compelled to acquire rights by lease over several different lines.

The Statutes of Iowa, Sections 1331, Code Supplement of 1913, and Section 1336 of the Code of 1897, provide that railway property shall be assessed for taxation by the Executive Council, which consists of the Governor, Secretary of State, Treasurer of State and Auditor of State. For this purpose the value of the property shall be determined as a whole within the limits of the State, and by the Council certified to the respective Counties through which its line extends, on the basis of the miles of main line within each County; and by the County authorities separated or distributed to the various taxing districts through which its line extends, on the basis of miles of main track located within the respective taxing districts. The taxes paid are computed by applying the levies of the respective taxing districts, and are paid to the treasurers of the respective counties.

In the year 1922, the Executive Council assessed the property of the Complainant at $22,306,104.00, or $29,000.00 per mile.

Section 2 of Article VIII of the Constitution of the State of Iowa provides that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals, and Section 6 of Article I provides that "all laws of a general nature shall have a uniform operation." Section 1305 of the Code of 1897 provides "All property subject to taxation shall be valued at its *actual value* * * *. Actual value of property as used in this *Chapter* shall mean its value on the market in the ordinary course of trade."

The claim of discrimination is based upon the fact that in the year 1922, and for several years prior thereto, a substantial portion of the property subject to taxation in the State, to wit, farm lands, which comprise more than 50 per cent of the total value of taxable property, had been assessed at less than their actual value, and, that such departure from the mandate of the Statute, that all property should be assessed at its actual value, had been uniform, systematic and notorious.

By stipulation it is established upon the hearing in the Court below, that in the year 1922 the actual average value of farm lands throughout the State was $125.00 per acre, whereas the actual average assessed value for the purpose of taxation was $76.63, or 61.3 per cent of the actual value as fixed by the stipulation.

The proof adduced included a report of the Tax Commission appointed in 1911, pursuant to authority of Chapter 204 of the Acts of the Thirty-fourth General Assembly, which, on October 8th, 1912, transmitted its report to the Governor. This report was introduced as Exhibit 1 and appears in the Record commencing on page 10. It contains the following. (Record, page 63, folio 149:)

> "By making a careful comparative study of actual valuations as given in the report of the Federal

Census and assessed valuations to be found in the report of the Auditor of State, the Commission has discovered that in 1850 property was being listed for taxation at approximately its entire sale value. At the present time, it is being listed at about one-half of its sale value and assessed at one-fourth of that amount."

There follows various Tables of comparisons between the actual and assessed value of farm lands. In such report it also appears, (Record, page 55, folio 125,) after referring to the ratio of assessed to actual value of farm lands in selective Counties, that—

"Two conclusions are apparent from a study of this Table; first, that the assessed valuation decreased very materially, the general average being eighty per cent in 1903, as compared with fifty-five per cent in 1909; and second, gross inequalities exist as between the aggregate assessed valuations of the various counties of the State."

This information is compiled in Table V, set in opposite page 51 of the Record, folio 123.

Folio 126 and Table VI, page 57 of the Record, shows that the ratio of the assessed value to true value of lands, January 1st, 1911, was 41.59 per cent in certain selected Counties.

Exhibit 2, Record, page 66, Fourteenth Census of the United States, 1920, contains a Table which shows that the average value of farm lands per acre, without buildings, in 1910 was $82.58 and in 1920, $199.52. In 1910, as appears by the Commission's tax report, lands were assessed at about one-half of their value, and in 1920, at a time when, according to the Exhibit referred to, their value was $199.52 per acre, the average assessed value was $75.61, or approximately 38% of their actual value.

By Exhibit 3, page 78 of the Record, Bulletin 874 of the Department of Agriculture, it appears that in 1917 the average value per acre of lands in Iowa was $156.00, whereas their assessed value for that year (Record, page 106) was $68.13. In 1918, their value per acre was $174.00 and their assessed value the same as in 1917; that is, in 1917 43% plus, and in 1918 about 39%. By the same Exhibit it is shown that in 1919 the actual average value of farm lands was $192.00 and their assessed value $75.64—approximately 39%. In 1920 their actual value was $255.00 and their assessed value the same as in 1919—$75.64, less than 30%. In 1921 the average assessed value was $76.63, the same as in 1922, and their actual value not less than $125.00 per acre, as found by a Court organized under Section 266 of the Judicial Code, 278 Federal, 298.

The evidence also shows by the affidavit of A. H. Davison former secretary of the Executive Council Exhibit 4, Record, page 84 and Table thereto attached, shows that it was disclosed, as a result of an investigation initiated by that body, that in 1903 the average assessed value of lands was 80% of their actual value; in 1909, 55%; in 1913, 46% and in 1919, 46% plus. That the tabulation attached to his affidavit, from which the foregoing percentages appear, was a part of the records in the office of the Secretary of the Executive Council.

In addition to the foregoing were the affidavits of W. L. Harding, former Governor, who stated in his opinion that the average assessed value of farm lands during his tenure and service as a member of the Executive Council did not exceed 50% of their actual value; the affidavit of Frank S. Shaw, former Auditor, and thus a member of the Executive Council, is to the same effect, and that of E. H. Hoyt, former State Treasurer, who stated that

the assessed value of farm lands was much less than their actual value. These affidavits appear as Exhibits 7, 8 and 9, appearing on pages 103, 104 and 105, respectively, of the Record.

For the purpose of showing that the property of the Complainant was, when assessed at the rate of $29,000.00 per mile, subjected to taxation on the basis of a greater proportion of its actual value than farm lands, there was shown by Exhibit 14 the operating results of Complainant's property for the five years immediately preceding January 1st, 1922, the compensation paid by the Government during the period of Federal Control, commonly known as the standard return; the market value of stocks and bonds; the value as indicated by the engineering report, prepared pursuant to the direction of the Bureau on Valuation of the Interstate Commerce Commission; and the net earnings within the State of Iowa, computed in accordance with the provisions of the Iowa Statute. A recapitulation of the data disclosed in this affidavit appears on page 126 of the Record, which shows that the value per mile, according to the physical value, is $13,515.00, according to net earnings in Iowa capitalized at five per cent, $21,509.00, market value of the securities, $23,791.00 (the average market value for a five year period), according to the system net earnings capitalized at 5 per cent and apportioned, $10,510.00, and standard return, capitalized at five per cent and apportioned, $39,859.00. In the net earnings, both in Iowa and for the system apportioned, a period of five years is used.

It is also disclosed in the Record by Exhibit B to Exhibit O, which latter was an affidavit of Clifford Thorne, shown opposite page 116 of the Record, that the system income for a period of ten years, in which the affiant used the standard return for the period of Federal Control

and six months thereafter, instead of the actual operating results, allocating to Iowa 50% of the system value, was $23,183,166.00, when the same is capitalized on the basis of six per cent.

If to any of these figures the equalizing factor of 61.3% is applied, the highest possible figure obtainable is $26,-671.00 per mile.

The trial Court held that the showing made by the Complainant was insufficient to entitle it to a preliminary injunction, saying—

> "On the basis of physical values, as tentatively determined by the Interstate Commerce Commission, the assessed value is 66 per cent plus if the figures of the carrier be correct, or 54 per cent plus if the figures of respondents are right. Using the reports to the Iowa Railroad Commission and the Executive Council for 1921, the system value is at least $120,-000,000.00. The parties agree that approximately 50% is a fair basis for allocation. Such would give $60,000,000.00 for Iowa value. The assessed value is less than 40% thereof. Using this same method as to the value found in Ex Parte #74, the result is slightly above 40%."

The dispute between the parties relative to the tentative physical value, which is indicated by the foregoing quotation, is not in fact a dispute. The difference in figures is explained by affidavit, Exhibit 20, page 129 of the Record, which shows that the witness Thorne in his affidavit, Exhibit O, erroneously added to the report of the Bureau on Valuation approximately two and one-half million dollars for working capital, and that he has added thereto as additions and betterments the amount taken into the capital expenditures account, as the result of the acquisition of the W., M. & P. R. R., its subsidiary, the property of which was included in the tentative engineering report, as set forth in Exhibit 11.

Moreover, the statement that, according to the reports to the Railroad Commission and Executive Council for the year 1921, the value of the system is $120,000.00 is erroneous. Such report is set forth as Exhibit P, Record, page 190, tables of figures being inserted opposite page 192, and nowhere discloses any such statement of value, except in connection with the amount of outstanding stocks and bonds. On the contrary, in that report the value in Iowa is $15,265,231.00, or approximately $19,000.00 per mile.

Moreover, it is shown that the cost of property account as carried on Complainant's books does not represent actual cash expenditure, but merely the par value of securities issued at the time the property was acquired, plus subsequent additions and betterments. (Record, page 129, folios 399 and 400.)

By affidavit Ex. No. 20 (Record, p. 129) it is shown that the Interstate Commerce Commission has made a tentative accounting report in which it is shown that the cost of the property should be carried on the books at 73 million instead of one hundred twenty.

It is conceded that approximately fifty per cent of the value of complainant's system is properly allocated to Iowa.

SPECIFICATION OF ERRORS RELIED UPON.

1. The said court, constituted under the provisions of Section 266 of the Judicial Code erred in denying to Complainant the relief prayed for.

2. The said Court, constituted under the provisions of Section 266 of the Judicial Code, erred in denying to Complainant a temporary injunction restraining the defendants from certifying an illegal assessment of its property for the purpose of taxation.

3. The said Court, constituted under the provisions of Section 266 of the Judicial Code, erred in denying to complainant a temporary injunction as prayed for, for the reason that the use or certification of the assessment made by the Executive Council of the State of Iowa of the property of Complainant for the purpose of taxation results in an illegal discrimination as against the Complainant, and is therefore illegal and void.

4. The said Court, constituted under Section 266 of the Judicial Code, erred in denying to Complainant the temporary injunction prayed for, for the reason that under the evidence adduced it was clearly shown that in all reasonable probability the Complainant could and would sustain the allegation or the allegations of its bill upon final hearing.

5. The said Court, constituted under Section 266 of the Judicial Code, in denying to Complainant the temporary injunction prayed for under the evidence did not indulge a reasonable discretion.

6. That the denial by the said Court, so constituted under Section 266 of the Judicial Code, of a temporary injunction to complainant as prayed for, constituted an abuse of discretion.

7. For the reason that the evidence adduced by Complainant fully met the burden of proof imposed upon it by law.

8. The said Court, so constituted under Section 266 of the Judicial Code, erred in denying to Complainant a temporary injunction for the reason that the purported assessment if certified and utilized by defendants in the further steps provided by the Statutes of the State of Iowa for the levying of taxes, will deprive Complainant of its property without due process of law, and will deny to Complainant the equal protection of the law, all con-

trary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

9. The said Court, so constituted under Section 266 of the Judicial Code, erred in denying to Complainant a temporary injunction for the reason that the purported assessment, if certified and utilized by defendants in the further steps provided by the Statutes for the levying of taxes, will impose upon this Complainant an undue and discriminatory portion of the tax burdens of the State contrary to the provisions of the Constitution of the State of Iowa, and particularly Section 5 of Article I, and Section 2 of Article VIII, of said Constitution, and contrary to the Fourteenth Amendment to the Constitution of the United States.

10. The said Court, so constituted under Section 266 of the Judicial Code, erred in denying to this Complainant a temporary injunction as prayed for the reason that Complainant in order to avail itself of its rights under the law will be compelled to resort to many actions at law or in equity, and will be subjected to a multiplicity of suits.

11. The said Court, so constituted under Section 266 of the Judicial Code, erred in denying to this Complainant a temporary injunction as prayed for the reason that the actions of defendants in certifying or utilizing as the assessed value of Complainant's property the sum of $29,000 per mile is violative of the provisions of Article VIII, Section 2 of the Constitution of the State of Iowa, and of Sections 1305, 1331, 1335 and 1336, of the Code of Iowa of 1897, as amended.

12. The said Court, so constituted under Section 266 of the Judicial Code, erred in denying to this Complainant a temporary injunction as prayed, for the reason that the act of defendants in certifying or utilizing as the as-

sessment of the property of this Complainant for the purpose of taxation the sum of $29,000 per mile, denies to this Complainant the equal protection of the laws and is therefore contrary to and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

13. The said Court, so constituted under Section 266 of the Judicial Code, erred in denying to this Complainant a temporary injunction as prayed, for the reason that by so doing the act of the defendants, so constituting the Executive Council of the State of Iowa, in certifying or utilizing as the assessment of the property of this Complainant for the purpose of taxation the sum of $29,000 per mile is construed to be in accordance with Sections 1305, 1334, 1335, 1336, 1378, 1379 and 1382, of the Code of Iowa, as amended, and said Sections when so construed are unconstitutional and void and contrary to and in contravention of the Fourteenth Amendment to the United States Constitution.

14. The said Court, so constituted under Section 266 of the Judicial Code, erred in denying to complainant a temporary injunction as prayed, for the reason that the act of said defendants, acting as the Executive Council of the State of Iowa in certifying or utilizing as the value of Complainant's property for taxation purposes the sum of $29,000 per mile while other railroads are assessed at a lesser proportion of their actual value, constitutes a discrimination against this Complainant, and denies to it the equal protection of the laws and takes from it its property without due process of law; for the reason that Complainant as a member of the class of persons owning a railroad property in the State of Iowa is discriminated against because the value of Complainant's property for taxation purposes is fixed at a higher per-

centage of its actual value than is other property of the same class.

15. The said Court, so constituted under Section 266 of the Judicial Code, erred in denying to Complainant temporary injunction as prayed, for the reason that the act of the defendants, acting as the Executive Council of the State of Iowa, in certifying or utilizing as the value of Complainant's property for the purpose of taxation the sum of $29,000 per mile, constitutes a discrimination against this Complainant, for the reason that other railroads in the State of Iowa are assessed at a lesser proportion of the actual value of their respective properties, all as was shown by evidence adduced, and said court by so denying said injunction denies to this Complainant the equal protection of the law and takes from it its property without due process of law.

16. The said Court, so constituted under Section 266 of the Judicial Code, erred in denying to Complainant the temporary injunction as prayed, for the reason that the evidence adduced upon the trial shows that the act of said defendants, acting as the Executive Council of the State of Iowa, in certifying or utilizing as the value of Complainant's property for taxation purposes the sum of $29,000 per mile constitutes a discrimination against this Complainant because of the fact that other railroads are assessed—a lesser proportion of their actual value, and by so denying said injunction it denies to this Complainant the equal protection of the laws and takes from it its property without due process of law, all contrary to the Fourteenth Amendment to the Constitution of the United States.

BRIEF.

JURISDICTION.

There being more than three thousand dollars in controversy, and a diversity of citizenship, the Court has jurisdiction.

A Court of Equity has jurisdiction to enjoin action looking to the enforcement of taxes upon the property of Complainant assessed under State authority, upon the ground of discrimination in value arising out of systematic undervaluation of other taxable property.

Green v. Louisville & Inter-Urban, 211 U. S., 499;
Louisville & Nashville vs. Green, 211 U. S., 522;
Illinois Central v. Green, 211 U. S., 555.

The Federal Court has jurisdiction of a controversy presented by a Bill which seeks to enjoin State officers from taking steps looking to the enforcement of taxes upon the property of Complainant assessed under State authority, upon the ground that the action of those officers in making those assessments will, if carried out, violate the Fourteenth Amendment, as denying the equal protection of the laws.

Green Cases, *Supra.*

The fact that the undervaluation of other classes of property results from the action of assessing boards different from that which assessed the property of Complainant does not deprive the Federal Courts of jurisdiction where the result is the outcome of systematic and persistent undervaluation by one body of officials, presumably known to and ignored by the other.

Green Cases, *Supra.*

ADEQUATE REMEDY AT LAW.

Inasmuch as the State law affords no opportunity for reviewing the action of the Executive Council for the purpose of determining whether or not the assessment is valid, there is no adequate remedy at law, even though there is provision for the recovery of taxes illegally collected.

Section 1117 of the Code of Iowa provides:

> "The Board of Supervisors shall direct the Treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

The foregoing Section is not applicable to the case of erroneous assessment made in the exercise of lawful authority. The only relief in such case is by application to the Board of Review.

Harris v. Fremont County, 63 Ia., 639.

It has also been held that the Board of Supervisors can order a refunding of taxes only by the Treasurer in office, not by a Treasurer who has gone out of office.

Egerly v. Bd. of Sup., 81 Iowa, 189.

After payment of taxes, a portion of which are due and collectible, the taxpayer cannot maintain an action to recover back another portion erroneously assessed.

Kehe v. Blackhawk County, 125 Iowa, 549.

The remedy is by mandamus to require the Supervisors of the respective Counties in which the taxes are paid to direct a refund by the Treasurer.

Egerly v. Jasper County, 72 Iowa, 149.

Therefore, there is no way provided by State Statute to recover the excess of taxes paid on an over-assessment, for if the determination of that question were open in a mandamus proceeding against the Supervisors contemplated by the foregoing Sections, it would require such proceedings to be instituted in 33 Counties, at the hazard of possible different results. Thus there is no remedy at all.

Wilson v. Ill. So., . . . U. S. . . ., 44 S. C. R. 203 decided Jan. 14, 1924.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

Section 2 of Article VIII of the Constitution of Iowa provides—

> "The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals."

Section 1305 of the Code Supplement of 1913 provides—

> "All property subject to taxation shall be valued at its actual value, and shall be assessed at twenty-five per cent of such actual value. Such assessed value shall be taken and considered as the taxable value of such property, upon which the levy shall be made. Actual value of property as used in this *chapter* shall mean its value in the market in the ordinary course of trade. This section shall not apply to special charter cities."

Section 1334, Code Supplement of 1913, which is included in the same Chapter as Section 1305, provides:

> "Railway Companies — when made — verified Statement — when furnished. On the second Monday in July in each year, the Executive Council shall

assess all the property of each railway corporation in the state, excepting the lands, lots and other real estate belonging thereto not used in the operation of any railway, and excepting railway bridges across the Mississippi and Missouri Rivers, and excepting grain elevators; *and for the purpose of making such assessment* its president, vice president, general manager, general superintendent, receiver or such other officer as the council may designate, shall on or before the first day of April in each year, furnish it a verified statement, showing in detail, for the year ended December 31st, next preceding:

"1. The whole number of miles of railway owned, operated or leased by such corporation or company within and without the state;

"2. The whole number of miles of railway owned, operated or leased within the state, including double tracks and side tracks, the mileage of the main line and branch lines to be stated separately, and showing the number of miles of track in each county;

"3. A full and complete statement of the cost and actual present value of all buildings of every description owned by said railway company within the state not otherwise assessed;

"4. The total number of ties per mile used on all its tracks within the state;

"5. The weight of rails per yard in main line, double tracks and side tracks;

"6. The number of miles of telegraph lines owned and used within the state;

"7. The total number of engines and passenger, chair, dining, official, express, mail, baggage, freight and other cars, including hand cars and boarding cars used in constructing and repairing such railway, in use on its whole line, and the sleeping cars owned by it, and the number of each class on its line within state, each class to be valued separately;

"8. Any and all other movable property owned by said railway within the state, classified and scheduled in such manner as may be required by said council;

"9. The gross earnings of the entire road, and the gross earnings in this state;

"10. The operating expenses of the entire road, and the operating expenses within this state;

"11. The net earnings of the entire road, and the net earnings, within this state."

Section 1336, likewise included in the Chapter of which Section 1305 is a part, provides:

"Valuation. The said property shall be valued at its actual value, and the assessments shall be made upon the taxable value of the entire railway within the state, except as otherwise provided, and shall include the right of way, road bed, bridges, culverts, rolling stock, depots, station grounds, shops, buildings, gravel beds and all other property, real and personal, exclusively used in the operation of such railway. In assessing said railway and its equipments, said council shall take into consideration the gross earnings per mile for the year ending January 1, preceding, and any and all other matters necessary to enable said council to make a just and equitable assessment of said railway property. If a part of any railway is without this state, then, in estimating the value of its rolling stock and movable property, they shall take into consideration the proportion which the business of that part of the railway lying within the state bears to the business of the railway without this state."

Section 1339 of the Code of 1897 provides:

"Rate: All such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purpose as the property of individuals within such counties, cities, towns, townships and lesser taxing districts."

These Sections require equality of the burden of taxation.

Iowa Cent. Ry. v. Bd. of Sup., 176 Iowa, 131;
Union Pacific Ry. v. Council Bluffs, (Iowa) 175 N. W., 7.

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Systematic undervaluation of farm lands and the knowledge of it upon the part of the Executive Council being established, indeed admitted, Complainant is entitled to an assessment of its property upon the same proportion of its value.

Iowa Cent. v. Bd. of Sup., 176 Iowa, 131;
Union Pac. Ry. v. Council Bluffs, (Iowa) 175 N. W., 7;
Green Cases—*Supra;*
Taylor v. Louisville & Nashville, 88 Fed., 350;
Louisville & Nashville v. Bosworth, 230 Fed., 191.

VALUE OF RAILWAY PROPERTY.

If the Executive Council in fixing the assessment departed from the mode prescribed by Statute or proceeded in disregard of the rights secured to the taxpayer by State law or Federal Constitution, it proceeded upon an erroneous principle.

Louisville & Nashville v. Green, 244 U. S., 522.

Complainant was entitled by State law to have earnings considered in determining value.

(a) The Statute, Sec. 1334-1913 Supp., required they be reported "for the purpose of making such assessment."

(b) They are recognized by the decisions of our Court as a necessary consideration.

Marshalltown L. P. & R. Co. v. Walker, 185 Iowa, 165;
City of Marion v. C., R. & M. Ry., 120 Iowa, 259.

The value of railway property is to be measured by the value of its use.

Monongahela Nav. Co. v. U. S., 148 U. S., 312;
Cleveland, Etc. Ry. v. Backus, 154 U. S., 439;
Adams Exp. Co. v. Ohio State Auditor, 166 U. S., 185;
Stevens v. Ottumwa C. L. & I. Co., 182 Iowa, 854;
Oregon, etc. Ry. v. Jackson County (Ore.), 61 Pac. 307;
Franklin Co. v. Nashville, etc. Ry., 12 Lea., 521;
L. & N. Ry. v. Greene, 244 U. S., 522;
State v. Central Pac., 10 N. W. 17;
Commonwealth v. Ledman, 106 S. W., 247;
Trustees v. Guenther, 19 Fed., 395;
L. & N. v. Coulter, 131 Fed., 282;
People, ex rel. v. Pond, 13 Abbotts New Cases, 1.

The market value of stocks and bonds has also been approved as a measure of value.

Railroad Tax Cases, 92 U. S., 575;
L. & N. v. Coulter, 131 Fed., 282;
L. & N. v. Greene, 244 U. S., 522.

Hence, to fix an assessment as the actual value without giving due consideration to the earning capacity or market value of stocks and bonds is to proceed upon an erroneous principle.

L. & N. v. Greene, 244 U. S., 522.

The opinion of the lower Court held the showing insufficient solely on the assumption that the Executive Council may have taken cost (either estimated cost of reproduction or book cost) as the actual value in the ordinary course of trade.

In view of the undervaluation of farm lands to the extent stipulated, the assessment of the Council or the action of the Court cannot be justified except by utter

disregard of the well established and approved methods of determining value.

The lower court erred in holding that an intentional over-assessment of complainant's property must be shown as well as the habitual and systematic undervaluation of farm lands.

Taylor vs. Ry., Supra;
Greene Cases, *Supra.*

ARGUMENT.

JURISDICTION.

The jurisdiction in this case is founded upon the diversity of citizenship, Complainant being a citizen of Illinois and all the defendants citizens of Iowa, as well as upon the claim of the enforcement of a constitutional right.

We deem it unnecessary to spend any time in argument upon it. We take it to be settled by the *Greene* cases, 211 U. S., 499, 522 and 555, respectively, and is not questioned by counsel for appellees.

ADEQUATE REMEDY AT LAW.

There is no provision in the State Statute which affords an opportunity to a railway company to have reviewed the action of the Executive Council in fixing its value for the purpose of taxation; and while Section 1417 set forth in the Brief undertakes to authorize the Boards of Supervisors of the respective Counties to direct the Treasurer to refund taxes erroneously or illegally collected, there is no method provided by which the question of the erroneous or illegal exaction of taxes of a railway company may be determined.

Decisions of the Supreme Court of Iowa are also cited in the Brief, to the effect that the Section has no application when the taxes claimed to have been illegally paid are paid because of an erroneous assessment, nor can action be maintained to recover the portion paid on the excess over the proper assessment.

Kehe v. Blackhawk County, 125 Iowa, 549.

It also appears that the Complainant's line extends into thirty-three Counties. Taxes being paid in the respective Counties, thirty-three actions would have to be brought, and the question of the propriety of the assessment tried thirty-three times. This is no remedy at all.

Wilson vs. Ill. So., 14 Sup. Ct. Rep. 203, decided Jan. 14, 1921.

UNDERVALUATION OF FARM PROPERTY.

In the Statement and Abstract of the case, we have set forth the evidence which, without dispute, establishes the fact that for several years prior to the assessment in question of the Complainant's property, farm lands of the State had been assessed at varying percentages of their actual value; and for the purpose of the hearing in the Court below, it was stipulated that in the year 1922 the average assessed value of farm lands throughout the State was but 61.3% of their average actual value. There has been at no time any dispute of this claim, and, in fact, it was admitted upon oral argument, not only that farm lands had been underassessed, but that the respective members of the Executive Council had knowledge of the fact.

UNIFORMITY REQUIRED.

That this is a violation of the constitutional and statutory provisions of the State, appears from a brief examination of the constitutional and statutory provisions under which property is assessed for taxation.

Section 2 of Article VIII of the Constitution of Iowa provides that "the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals."

Section 1305 of the 1913 Supplement to the Code provides:

> "All property subject to taxation shall be valued at its actual value * * *. Actual value of property as used in this *Chapter* shall mean its value on the market in the ordinary course of trade."

In this Chapter is included those Sections which relate to the assessment of farm lands, as well as to those which relate to the assessment of railways and other property.

Section 1336, a part of the Chapter in which 1305 is included, provides that "the property of railways shall be assessed at its actual value," and Section 1339 of the Code of 1897 provides:

> "All such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purpose as the property of individuals within such counties, cities, towns, townships and lesser taxing districts."

These Sections require uniformity in taxation and equality of the burden.

In *Iowa Central R. Co. v. Board*, 176 Iowa, 131, which

was an appeal from the Board of Review fixing the value for taxation of a bridge across the Mississippi River, belonging to the appellant, it was claimed that the bridge was assessed at 66.73 per cent of its value, while lands which constitute 86.2 per cent in value of the total property assessed in the township in which the property under consideration was located, and other lands in the County, were assessed at 37.55 per cent of their true value, and that the taxable value of all property in the township and county was 40.6 per cent of true value.

In referring to the statutory and constitutional provisions, the Court said:

> "And Article 8, Section 2, of the Constitution of Iowa, provides that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals. Other articles of the Constitution and the decisions of the courts are that taxes must be uniform, and must not be imposed alone or unequally upon particular individuals or classes. The paramount object which the law seeks to insure in distributing the burdens of taxation is equality; and, although the property of a taxpayer is assessed at less than its true value, nevertheless, if it is assessed higher proportionately than other property, he has a just cause of complaint."

The Court ordered a reduction of the assessment to 40.6 per cent of the actual value of that part of the bridge which was taxable in Iowa. This language is quoted with approval in *Union Pacific Ry. vs. Council Bluffs*, 175 N. W. 7.

In as much therefore, as uniformity and equality of burden are required by state law, and that there has been a systematic undervaluation of farm lands, known to the Executive Council, the case falls within the rule announced in *Taylor vs. Ry.*, 88 Fed. 350, where it is said:

> "If any board which is an essential part of the taxing system intentionally and therefore fraudulently violates the law by uniformly under-valuing certain classes of property, the asessment by other boards of other classes of property at the full value makes the whole assessment considered as one judgment, a fraud upon the fully assessed property, and this is true although the particular board assessing complainant's property may have been wholly free from fault or fraud or intentional discrimination."

This language was approved by the Supreme Court in *Greene v. Inter-urban*, 244 U. S., 449, and again in *Sioux City Bridge Company v. Dakota County*, 66 Law Ed., 343, decided January 2, 1923.

VALUATION OF RAILWAY PROPERTY.

Uniformity and equality being required, and the fact of intentional and systematic undervaluation of farm lands being proved without dispute, there remains for consideration only the question of whether or not the value of complainant's property as fixed by the Executive Council was a greater proportion of its actual value than the percentage of farm lands assessments to their value.

There is no record which discloses any finding by the Executive Council of actual value of Complainant's property, or any finding of the extent of undervaluation of farm lands. Nor did the Court below find as a fact the value of the railway. The effect of the opinion of the trial court was to refuse to investigate the question of the actual value of Complainant's property as appears from the following quotation from the opinion:

> "On the basis of physical values, as tentatively determined by the Interstate Commerce Commission, the assessed value is 66 per cent plus if the figures of

the carrier be correct or 51 per cent plus if the figures of the respondents are right. Using the reports to the Iowa Railroad Commission and the Executive Council for 1921, the system value is at least $120,000,000.00. The parties agree that approximately 50% is a fair basis for allocation. Such would give $60,000,000.00 for Iowa value. The assessed value is less than 40% thereof. Using this same method as to the value found in *Ex Parte* #71, the result is slightly above 40%.

We conclude, therefore, that the Council cannot, on evidence which includes the above, be found to have intentionally overvalued the property of this Complainant."

In other words, the Court found the showing insufficient to entitle the Complainant to a reduction of its assessment, because of the fact that the Council had before it the so-called tentative value of the Interstate Commerce Commission and the report of the carrier for the year 1921.

In the first place, it should be said that in the report to the Railroad Commission and the Executive Council for the year 1921, there is no basis for the statement that the system value is $120,000,000.00, except that it appears therein that such is the par of the outstanding stocks and bonds and is the same figure used by the Commission in *Ex Parte* 71. (Record, page 149.)

The report to the Executive Council referred to appears in the Record as ~~*Ex Parte* 74~~ Exhibit P, folio 500 —"Schedule Ten shows that the value of the system in Iowa is $15,265,231"; and no place in the Record is there a statement that the value is $120,000,000, except as that figure was used by the Interstate Commerce Commission in *Ex Parte* #74.

It may be said that the Court in denying the relief upon the grounds stated, in effect held that the Executive

Council was justified in using cost, either book cost or cost of reproduction, as the sole basis as the determination for the actual value in the ordinary course of trade.

But under the laws of the State the Complainant was entitled to have other matters considered.

First, Section 1334 of the 1913 Supplement to the Code, required a report to the Executive Council, which included net earnings. This report is required by the terms of the Statute "for the purpose of making such assessment."

Second, the decisions of the Supreme Court of Iowa recognize the necessity of the consideration of something other than cost for the purpose of determining value for taxation.

In the case of *City of Marion v. C., R. & M. Ry. Co.*, 120 Iowa, 259, there was involved the question of whether or not the city railway, assessed under a different section but subject to the mandate of Section 1305, should be determined by the value of its physical parts. The Court said:

> "In such structure the materials have become the correlated and appropriate parts of a single, income-producing concern, having a value of its own by reason of its organization and use, which may be much more *or much less* than the original value of the materials entering into its construction."

And again—

> "It is rather such value as fair and reasonable men, having knowledge of such matters, would place upon this mile of road as an integral part of the system to which it is attached; taking into due consideration its cost of construction, state of repair, *and capacity and efficiency* for the purposes of which it was created."

In *Marshalltown L., P. & R. Co. vs. Welker*, 185 Iowa, 165, the Supreme Court of Iowa in passing upon the question of what should be taken into consideration in determining value for the purpose of taxation said:

> "The value of the business, its earning power, the size of its dividends, etc., must always be taken into consideration."

In the case of *Stevens v. Ottumwa Cold Storage & Ice Co.*, 182 Iowa, 851, in considering the question of the value of a particular piece of property said:

> "The property was not a going concern. This, of itself, would greatly depreciate its market value as a whole. How much it would depreciate it would be, to some extent, a matter of guess work. If the property could be utilized advantageously, it could fairly be said to be worth approximately what it would cost to reproduce it. On this theory, the larger values were, perhaps, not greatly exaggerated. But the difficulty was to utilize it. *Its cost, therefore, was not a criterion of its value.* It was like a ship cast upon the land. It would cost as much to build it there as to build it anywhere. But its value in such a place could not be measured by the cost of building it there. And so this ship of the brewing company found itself in a dry place, and the question of value became largely a question of salvage."

This case was not a taxation case, but was the expression of the views of the Court upon the meaning of "market value," which term the legislature adopted in Section 1305 as the basis for the purpose of taxation.

So it would seem that under the laws of the State the actual value or value in the market in the ordinary course of trade cannot be determined without due consideration of the earning power of the property in question.

of the improvements upon it. The assessable value for taxation of a railroad track can only be determined by looking to the elements on which the financial condition of the company depends, its traffic as evidenced by its rolling stock and gross earnings in connection with its capital stock."

This Court also said in *L. & N. v. Greene*, 244 U. S., 522:

"In such cases there are at least two recognized methods known as the stock and bond plan and the capitalization of income plan."

In *Adams Express Co. v. Ohio State Auditor*, 166 U. S., 185, the Court said:

"Now it is a cardinal rule which should never be forgotten that whatever property is worth for purposes of income and sale it is also worth for purposes of taxation. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income or for purposes of sale."

The other cases cited under this heading of the Brief sustain this proposition.

In *Trustees vs. Guenther*, 19 Fed., 395, the Court said:

"To make the cost of a thing, especially a railroad, the measure of its value or even a chief constituent thereof is most fallacious * * *. Its cost may be looked to as an element entering into its value but not as its sole or even chief element. The earnings of a railroad, present and prospective, must form a most important ingredient in the estimation of its value."

The stock and bond plan has also had the approval of this Court as a method for the determination of value for the purpose of taxation. We have already referred to the language in the *Greene* case.

It was said in the *Railroad Tax* Cases, 92 U. S., 575:

> "When you have ascertained the current cash value of the whole bonded debt and the current cash value of the entire number of shares, you have by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock and its franchise, for these are all represented by the value of its bonded debt and by the shares of its capital stock."

See also *L. & N. v. Coulter*, 131 Fed., 282.

It is very evident that the Executive Council in fixing the assessment of Complainant's property at $29,000.00 per mile utterly disregarded the market value of its stocks and bonds, its earnings, and its history of unsuccessful operation. This must be so, for the assessment can be justified in no other way than to accept the cost of construction as the sole basis of value. There was nothing else before the Council indicating any such value. In so doing, it seems evident that "they proceeded in disregard of rights secured by the taxpayer" to have the net earnings taken into consideration for the purpose of determining the actual value. This Court said, in *L. & N. v. Greene, supra:*

> "In this case there is no showing of fraud, the contention being that the Board departed from the mode provided by the Statute. If they did this, or if they proceeded in disregard of rights secured to the taxpayer by the State or Federal Constitutions, of course they proceeded upon an erroneous principle."

The record discloses that a capitalization of the net income of the railroad for the five years preceding this assessment and ignoring the $3,000,000 deficit from operations in 1920, would yield a value for the system of $29,000,000 plus, whereas the assessment for Iowa alone is $22,000,000.00 plus.

In the affidavit of witness Thorne, Exhibit O, there is disclosed the income of the system for ten years, in which there is, however, substituted the standard return during the years of Federal Control and guarantee period for the actual operating results, and without taking into account any inaccuracies in his compilation of the income so derived, capitalized at six per cent, would yield a value for the State of $23,000,000.00 plus. If the equalizing factor (61.3) were applied, it would require an assessment of about $14,000,000.00 instead of $22,000,000.00.

The Great Western has never paid a dividend on its common stock, as the Record discloses. At the time of the hearing in the Court below, there had accumulated on its four per cent preferred stock since the year 1914, the year in which it became cumulative, unpaid dividends amounting to 25 per cent. The taxes paid in Iowa have at times in the past exceeded the net income within the State.

Not only this, but the Record discloses that for the year 1922 it was assessed at 75 per cent of the value of the North Western Railroad Company and over 80 per cent of the amount at which the Burlington Railroad is assessed. That the average earnings per mile of each of those lines for the five years immediately preceding 1922, were more than five times as much as the average earnings per mile of the Complainant. That each have double track lines across the State; that each have been

dividend paying Companies and each possess valuable terminals within the State. (Record, page 121.)

We mention these things not because we expect this Court to examine the Record on disputed questions of fact, nor to review any finding of fact of the lower Court upon disputed evidence; but for the purpose of showing how little dispute there actually was on the question of real value of Complainant's property, and for the purpose of showing that the action of the Council in fixing the assessment at $29,000 per mile did proceed in disregard of the legal right of the Complainant, in that it failed to give due consideration to a factor that must, under the law of this State, always be considered in determining value of taxation,—the net earnings,—that in so doing it proceeded upon an erroneous principle.

They demonstrate, we think, the error of the opinion of the Court below, in denying the temporary injunction upon the ground that the Council could in good faith have fixed the assessment of the Complainant's property as it did, merely because the par of its stocks and bonds was $120,000,000.00, when their actual average market value was $35,000,000.00, or merely because the cost of reproducing the railroad and its equipment would be $70,0000,000.00, when the evidence demonstrates that it will not earn an income on more than $40,000,000.00.

These facts show that in all reasonable probability the Complainant would be able on final hearing to sustain the allegations of inequality and intentional discrimination.

The Court misconceived the principle applicable to the case at bar in assuming that an intentional overvaluation of Complainant's property was required to be proved, as well as the habitual and systematic undervaluation of other classes of property. The departure

from the requirements of the State law to assess all property at its actual value, which is shown by the long followed course of undervaluation of farm lands, entitles the Complainant to an assessment upon the same basis. No actual intention to injure Complainant need be shown. The failure to accord it the same treatment as owners of other classes of property were accorded constitutes the wrong on account of which Complainant is entitled to relief. The necessary intention to discriminate is to be found in the failure of the Council to take into account the known systematic undervaluation of other classes of property. This is the rule laid down in the *Taylor* case and the *Greene* cases. It is the mandate of the State law as declared in *Iowa Central v. Board.*

We respectfully urge that the exercise of sound discretion required the issue of a temporary injunction, and that the Order from which the appeal is taken should be reversed for that purpose upon such terms as to the Court may seem equitable.

Respectfully submitted,

CLIFFORD V. COX,

WM. F. RILEY,

DONALD EVANS,

Solicitors for Appellant.

NO. 23.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Appellant,

vs.

NATHAN E. KENDALL, GOVERNOR OF THE STATE OF IOWA;
WALTER C. RAMSAY, SECRETARY OF STATE OF IOWA;
GLENN C. HAYNES, AUDITOR OF THE STATE
OF IOWA, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF FOR APPELLANT.

J. G. GAMBLE,
Counsel for Appellant.

W. F. DICKINSON,
W. F. PETER,
R. L. READ,
Of Counsel.

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AUTHORITIES.

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BRIEF FOR APPELLANT.

This is an appeal direct to this Court under Section 266 of the Judicial Code from the order of the United States District Court, for the Southern District of Iowa, constituted of three Judges for the hearing of the application, denying the application of appellant here for an interlocutory injunction.

STATEMENT OF THE PLEADINGS.

On July 27th, 1922, appellant (hereinafter called complainant), filed its bill in the United States District Court, for the Southern District of Iowa, Central Division, making as defendants thereto, Nathan E. Kendall, individually and as Governor of the State of Iowa, Walter C. Ramsay, individually and as Secretary of State of the State of Iowa, Glenn C. Haynes, individually and as Auditor of State of the State of Iowa, W. J. Burbank, in-

dividually and as Treasurer of State of the State of Iowa, and R. E. Johnson, individually, and as Secretary of the Executive Council of the State of Iowa.

The bill filed sought to enjoin the said Kendall, Ramsay, Haynes and Burbank, and each of them individually, and as members of the Executive Council of the State of Iowa, from apportioning to any of the Auditors of any of the Counties in the State of Iowa, or to any other taxing district in the State of Iowa, an alleged assessment of the property of the complainant exclusively used in the operation of its railway in said state, which said assessment had been fixed by said Executive Council at the sum of $30,100.00 per mile, or in the aggregate sum of $66,950,984.00, and to enjoin the said Johnson, individually, and as Secretary of the Executive Council, from certifying to the said County Auditors, or any of them, or any officers of the Counties into or through which the line of railroad of complainant extended, any of the aforesaid alleged assessments.

It charged that the authorities in said state who were delegated with the duty of fixing the assessments of property for the purposes of taxation during the year 1922, and for many years prior thereto, habitually, intentionally, systematically and generally assessed farm lands at a rate far under the real value of such lands in the market thereof in the usual course of trade; that the farm lands in Iowa comprised a substantial proportion of the value of the entire property in the state subject to assessment and taxation generally; that such systematic assessment of such farm lands under the real value thereof was a matter of public notoriety, and such fact was known to the said defendants at and prior to the time of the making of the assessment by them of the property of complainant in the year 1922, but that not-

withstanding such knowledge the said defendants knowingly and intentionally, and over the protest and objections of the complainant, fixed its assessment at the sum of $30,000.00 per mile, or at substantially 75% of its real value.

The complainant at the time of filing its bill made application for an interlocutory injunction under Section 266 of the Judicial Code. The District Judge called to his assistance to hear the application Hon. Kimbrough Stone, United States Circuit Judge, and Hon. Thomas C. Munger, United States District Judge, for the District of Nebraska. On October 23, 1922, the three Judge Court assembled and the defendants through the Attorney General of Iowa filed a resistance to the application of complainant for an interlocutory injunction, by which resistance it was claimed that the suit was against the State of Iowa, without its consent, that the court had no jurisdiction over the controversy or the defendants named; that complainant had a full, complete and adequate remedy at law; that there was no equity in the bill; that the bill sought to review, interfere with and control the exercise of the judgment, discretion and power reposed in the defendants by the laws of Iowa; that the bill on its face showed that the property of complainant had been assessed for taxation at less than its actual value, and at less than the statutes of the State of Iowa required, and therefore complainant had no just grounds for complaint; that the decisions of officers and tribunals specially created and charged by the laws of the State of Iowa with the duty of valuing property for taxation, and equalizing such valuation, are final and conclusive; that the bill presented only the complaint of an individual taxpayer, that its property had been assessed by the Executive Council of Iowa at a relatively greater valuation than a

certain other general class of property, namely, farm lands; that farm lands constitute approximately 51 per cent of the total assessed property of the state [illegible] complainant's property constitutes less than 1 [illegible] thereof; that other large classes of property [illegible] been assessed substantially 100 per cent of their value, and that to grant relief in this case would work an irreparable injury to such other classes of property; that the Executive Council acted in good faith and without fraud in the fixing of the value of complainant's property.

Beginning October 23, 1922, the application for interlocutory injunction was heard by the three Judge Court.

On October 30, 1922, the three Judge Court announced that it would enter an order denying the application of complainant for a temporary injunction, and would file a memorandum opinion in said cause. Such order, however, was not filed until November 10, 1922, and in the interim complainant moved that such order contain a provision suspending its effective date until an appeal to this court might be disposed of. Such motion having been overruled, the Court on November 10, 1922, filed its opinion (Trans. Pages 24 to 30), and on said date complainant filed its petition for allowance of appeal with assignment of errors and its application for supersedeas pending appeal, and for an order staying the proceedings pending such appeal.

The appeal having been allowed, as well as the application for supersedeas and stay having been sustained, the court entered its order on December 5th restraining the defendants, pending this appeal, from certifying to the Auditors of the various Counties any portion of the assessment of complainant's property, or from using any other assessed value of the property of complainant in

excess of $27,968.00 per mile on condition that complainant should file bond, which was done.

The appeal was duly lodged in this court, an order enlarging the time for docketing said appeal having been in due time entered.

By stipulation of the parties hearing of this appeal was continued over the October, 1923, Term.

STATEMENT OF THE CASE.

Section 1305, Iowa Code Supplement 1913, which is included in Chapter 1, Title 7, of that Code relating to assessment of taxes, provides:

> "All property subject to taxation shall be valued at its actual value, which shall be entered opposite each item and shall be assessed at twenty-five per cent of such actual value, such assessed value shall be taken and considered as the taxable value of such property upon which the levy shall be made. Actual value of property as used in this chapter shall mean its value in the market in the ordinary course of trade. This section shall not apply to special charter cities."

Section 1336, Code of Iowa 1897, concerning the assessment of railroad property which likewise is included in Chapter 1, Title 7, of the Code relating to assessment of taxes, provides:

> "The said property shall be valued at its actual value, and the assessments shall be made upon the taxable value of the entire railway within the state, except as otherwise provided, and shall include the right of way, roadbed, bridges, culverts, rolling stock, depots, station grounds, shops, buildings, gravel beds and all other property, real and personal, exclusively used in the operation of such railway. In as-

sessing said railway and its equipments, said council shall take into consideration the gross earnings per mile for the year ending January first, preceding, and any and all other matters necessary to enable said council to make a just and equitable assessment of said railway property. If a part of any railway is without this state, then, in estimating the value of its rolling stock and movable property, they shall take into consideration the proportion which the business of that part of the railway lying within the state bears to the business of the railway without this state."

Sections 1334, 1334-a-b and c of the Iowa Code Supplement 1913, Section 1335 of the Code of Iowa of 1897, Sections 1337, 1337 a and b of the Iowa Code Supplement, 1913, and Sections 1338, 1339 and 1342 of the Code of Iowa of 1897, all relate to furnishing of information in connection with the assessment of property exclusively used in the operation of railways as well as the spreading of such assessment and rate of tax to be levied thereon.*

Farm lands and certain other species of property are originally assessed by local assessors in the several taxing districts of the State, such assessments being subject to review by special statutory tribunals. (Sections 1350, 1352, 1354, 1356 and 1370, Code of Iowa, 1897.) Real estate, however, is required by the statutes to be listed and valued in each odd numbered year, and in each year in which real estate is not regularly assessed the assessor shall list and assess any real property not included in the previous assessment, and also any building erected since the previous assessment. The assessment of farm lands or real property is, however, subject

*For the convenience of the court in the appendix hereto the sections of the Iowa Statutes referred to are set out in full.

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to the requirements of Section 1305, Iowa Code Supplement 1913, that the same be valued at actual value as therein defined.

Upon the hearing it was stipulated that in lieu of the introduction of evidence that the market value of farm lands as contemplated by Section 1305 of the Code of Iowa of 1897 on January 1, 1922, and August 1, 1922, was on the average $125.00 per acre. (Trans. Page 13.) The assessment of such farm lands for the years 1921 and 1922 was upon the average at the rate of $76.63 (Affidavit of A. B. Howland, Trans. P. 121, and Exhibit "C" thereto, P. 127.)

Upon the hearing there was introduced in evidence as complainant's Exhibit "1" (Trans. P. 49 to 79) the report of the Special Tax Commission appointed by the Governor of Iowa under the provisions of Chapter 204 of the Acts of the 34th General Assembly of Iowa, such report being dated October 8, 1912, and in and by which report it is shown that said Commission found that in 1911 there was "a very decided under assessment of farm lands, and also substantial inequalities in the average assessed value of this class of property as between various counties of the state," and further found that the Executive Council of Iowa in 1909 ascertained that farm lands had been assessed for less than half their then present actual value. There was also offered on the hearing as complainant's Exhibit "2" a bulletin of the Department of Commerce, Bureau of the Census of the United States, by which the value of farm lands in Iowa on January 1, 1920, per acre on the average was shown to be for land and buildings $227.09, and for land alone $199.52 (Trans. P. 87), whereas such lands in 1919 and 1920 were valued for assessment on the average at the rate of $75.64 per acre (Trans. P. 122 and 125.)

There was also introduced as complainant's Exhibit "3" No. 871 issued by the United States Department of Agriculture, concerning farm land values in Iowa, by which it was disclosed that the average value per acre of farm lands in Iowa in 1920 was $255.00 and 1919 was $192.00. (Trans. P. 93.) It was further shown by the affidavit of A. H. Davidson, who was Secretary of the Executive Council of Iowa from 1899 to 1917, that in 1919 pursuant to statutory authority the Executive Council of Iowa caused an investigation to be made from which it was disclosed that the average value of farm lands was $164.09, whereas the average assessment thereof during said year was $75.61 per acre, and that such information was contained in the records of the Executive Council of Iowa. (Trans. P. 97 and 99.) It was further shown that the individuals comprising the Executive Council of the State of Iowa in the years 1919 and 1917 knew that the assessed value of farm lands as equalized by the Executive Council did not exceed 50 per cent of the actual value of farm lands. (See Complainant's Exhibits 7, 8 and 9, Trans. P. 117 to 121.)

Extensive compilations gathered from the public records of the sales of farm lands as well as the assessments of farm lands in each of the years 1916 to 1920 inclusive were disclosed by complainant's Exhibits 5 and 6 (Trans. P. 101 to 117), and show that the assessment of farm lands was at a rate greatly less than the actual value of such lands in each of said years.

Section 1331 of the Iowa Code Supplement of 1913 provides that for the purpose of making the assessment of railway property the officers of each railway shall furnish to the Executive Council verified statements disclosing for the year ended December 31st next preceding, the following information:

"1. The whole number of miles of railway owned, operated or leased by such corporation or company within and without the state;

"2. The whole number of miles of railway owned, operated or leased within the state, including double tracks and side tracks, the mileage of the main line and branch lines to be stated separately, and showing the number of miles of track in each county;

"3. A full and complete statement of the cost and actual present value of all buildings of every description owned by said railway company within the state not otherwise assessed;

"4. The total number of ties per mile used on all its tracks within the state;

"5. The weight of rails per yard in main line, double tracks and side tracks;

"6. The number of miles of telegraph lines owned and used within the state;

"7. The total number of engines, and passenger, chair, dining, official, express, mail, baggage, freight and other cars, including hand cars and boarding cars used in constructing and repairing such railway, in use on its whole line, and the sleeping cars owned by it, and the number of each class on its line within the state, each class to be valued separately;

"8. Any and all other movable property owned by said railway within the state, classified and scheduled in such manner as may be required by said council;

"9. The gross earnings of the entire road, and the gross earnings in this state;

"10. The operating expenses of the entire road, and the operating expenses within this state;

"11. The net earnings of the entire road, and the net earnings, within this state."

Section 1334-a, Code Supplement of 1913, requires a report of the amount of real estate owned or used by each railway company for railway purposes.

Section 1335, Code of Iowa of 1897, relates to the determination of operating expenses as the same shall be reported.

Section 1340-a, Code Supplement of 1913, relates to the determination of gross earnings and provides for such determination upon a straight mileage prorate of earnings upon inter and trans-state movements.

Upon the hearing the complainant presented as its Exhibit "11", the affidavit of A. Hermany with the exhibits thereto attached, which computed the value of complainant's property as a whole upon six bases:

1st. The par value of the stocks and bonds of complainant on the average for the period of five years ended June 30, 1922.

2nd. The market value of its stocks and bonds upon the average for the same period.

3rd. The net railway operating income of complainant capitalized at 6% on the average for the same period.

4th. The net operating railway income of complainant capitalized at 7% on the average for the same period.

5th. The annual rental paid by the government for complainant's property during the Federal Control and the guaranty period capitalized at 6%.

6th. The value of the entire line as represented by property investment shown in the proceeding as *Ex Parte* 71 as of October 31, 1919.

In the first five of these instances the values were determined on the bases described for the system property of complainant, and were allocated to the State of Iowa upon six bases, namely: railway operating revenues, net revenue from railway operations, miles of road operated, miles of all track operated, transportation train miles, and traffic units. The formulae employed in the determination of such value is set forth in

considerable detail in complainant's Exhibit "11". (Trans. P. 131 to 135.) By Exhibit "6" to complainant's Exhibit "11" is shown an assignment of value as represented by property investment shown in *Ex Parte* 74 on the basis of composite transportation miles, and discloses a value of complainant's property in the State of Iowa of $87,293,151.00.

Railway operating revenues, one of the bases used for the allocation of value to the State of Iowa is defined (Trans. P. 131), and is equivalent of gross revenue. Complainant's Exhibit "12", (Trans. 145 to 157) constitutes a complete transcript of the hearing before the Executive Council of Iowa previous to the making of the assessment involved.

The value of the entire property of complainant as represented by the par value of its stocks and bonds on the average for the five years ended June 30, 1922, was $349,047,318.00. This value apportioned to the State of Iowa on the average of the six bases heretofore described was $81,624,987.00. The complainant's property was assessed $66,950,984.00. Upon this basis of value the assessment was 81.09 per cent of actual value.

The value of the entire property of complainant as represented by the par value of its stocks and bonds on the average for the five years ended June 30, 1922, was $349,047,318.00. This value apportioned to the State of Iowa on the basis of gross revenue, or railway operating revenue, for the year 1922, was $78,500,741.00. Upon this basis the assessment was 85.2 per cent of actual value. (Exhibit 1 to Exhibit 11, following Trans. 136.)

The value of the entire property of complainant as represented by the par value of its stocks and bonds for the year ended June 30, 1922, was $370,836,650.00. This value apportioned to the State of Iowa on the basis of

railway operating revenues or gross revenues was $83,401,162.00. Upon this basis the assessment was 80.2 per cent of the actual value. (Exhibit 1 to Exhibit 11, following Trans. 136.)

The value of the entire property of complainant as represented by the market value of its stocks and bonds on the average for the five years ended June 30, 1922, was $225,359,823.00. This value apportioned to the State of Iowa on the average of the six bases heretofore described was $52,705,346.00. Upon this basis of value the assessment was 127 per cent of actual value.

The value of the entire property of complainant as represented by the market value of its stocks and bonds on the average for the five years ended June 30, 1922, was $225,359,823.00. This value apportioned to the State of Iowa on the basis of gross revenue or railway operating revenue for the year 1922, was $50,683,424.00. Upon this basis the assessment was 132 per cent of actual value.

The value of the entire property of complainant as represented by the market value of its stocks and bonds for the year ended June 30, 1922, was $262,880,695.00. This value apportioned to the State of Iowa on the basis of railway operating revenues or gross revenues was $59,121,868.00. Upon this basis the assessment was 113 per cent of the actual value. (Exhibit 2 to Exhibit 11, following Trans. 136.)

The value of the entire property of complainant as represented by its railway operating income capitalized at six per cent on the average for five years ended June 30, 1922, was $141,128,255.00. This value apportioned to the State of Iowa on the average of the six bases heretofore described was $33,161,037.00. Upon this basis of value the assessment was 200 per cent of actual value.

The value of the entire property of complainant as represented by its net railway operating income capitalized at six per cent on the average for the five years ended June 30, 1922, was $141,128,255.00. This value apportioned to the State of Iowa on the basis of gross revenue or railway operating revenue for the year ended June 30, 1922, was $31,739,711.00. Upon this basis the assessment was 210 per cent of actual value.

The value of the entire property of complainant as represented by its net railway operating income capitalized at six per cent for the year ended June 30, 1922, was $248,234,987.00. This value apportioned to the State of Iowa on the basis of railway operating revenues or gross revenues was $55,828,048.00. Upon this basis the assessment was 119 per cent of actual value. (Exhibit 3 to Exhibit 11 following transcript 136.)

The value of the entire property of the complainant as represented by the annual rental paid by the government during federal control and the guaranty period capitalized at six per cent on the average for the two years ended June 30, 1920, was $245,899,805.00. This value apportioned to the State of Iowa on the average of the six bases heretofore described was $57,954,486.00. Upon this basis of value the assessment was 115 per cent of actual value.

The value of the entire property of complainant as represented by the annual rental paid by the government during federal control and the guaranty period capitalized at six per cent on the average for the two years ended June 30, 1920, was $245,899,805.00. This value apportioned to the State of Iowa on the basis of gross revenue or railway operating revenue for the year ended June 30, 1922, was $55,302,866.00. Upon this basis

the assessment was 120 per cent of the actual value. (Exhibit 5 to Exhibit 11 following transcript 136.)

The defendants presented exhibits showing assessed value of the complainant's property during each of the years 1913 to 1922 inclusive (Trans. 176); certain correspondence between the Board of Railroad Commissioners of Iowa asking the value of the investment in road and equipment as furnished to the Bureau of Valuation of the Interstate Commerce Commission and response thereto (Trans. 177); a statement showing assessed value of all farm lands (180), assessed value of town lots (181), assessed value of bank stock (182), assessed value of live stock (182), assessed value of transmission lines (183), assessed value of telegraph and telephone (183), assessed value of express property (184), assessed value of all other property including moneys and credits, excluding railroad property and farm lands (184), assessed value of railroad property (185), assessed value of all property except farm land and railroad property (185), assessed value of all property except railroad property (186), assessed value of all property including railroad property (187), a statement of the Chairman of the Board of Directors to the stockholders of the complainant dated January 7, 1922, relating to the tentative valuation of complainant's property made by the Bureau of Valuation of the Interstate Commerce Commission (187), the protest of complainant filed to the tentative valuation made by said Bureau (193), the annual report of the complainant made to the Executive Council of the State of Iowa for the year ended December 31, 1921, (206 to 214), Exhibit "8" presented by complainant to the Executive Council of the State of Iowa constituting an analysis of the interstate commerce commission's tentative valuation of complainant's property (215), compilations of ex-

penditures for road and equipment during the years from June 30, 1914, to December 31, 1921, and similar compilations for mileage statistics (223), exhibits based upon the tentative valuation of complainant's property by the Interstate Commerce Commission and undertaking to allocate unallocated property on the basis of the percentage of allocated property in Iowa to allocated property of complainant outside of Iowa, (Trans. 224 to 228), an affidavit of Clifford Thorne undertaking to determine value of the physical properties of complainant plus alleged franchise or intangible value (229 to 292), and similar computations disclosed by the affidavits of Neill Garrett (292 to 299), as well as statistics concerning operating ratio of all lines reporting to the Iowa Railroad Commission, and an undertaking to apply such operating ratios to determine the net operating revenue of complainant, statement of L. E. Wettling in *Ex Parte* 74, showing property investment of Chicago, Rock Island and Pacific lines in that proceeding (302), affidavit of E. G. Nourse concerning earnings on farms (303 to 313), a copy of the tentative valuation of complainant's property made by the Bureau of Valuation of the Interstate Commerce Commission (314 to 458).

The so-called final value included in the tentative valuation of all of complainant's property devoted to common carrier purposes approximated $322,277,596.00 (356). The total amount of the property of complainant unallocated to any state included in said report for complainant's entire line approximated $51,411,344.00 (345). The total value of allocated property for the entire system therefore was shown by said report to be $270,866,252.00. The total engineering property allocated to Iowa in said tentative valuation was shown to be $58,569,838.00 (342). The total land value in Iowa, present value, includ-

ing non-carrier lands and non-carrier structures on carrier lands was shown to be in said tenative valuation $10,783,274.96, and such value including non-carrier lands and non-carrier structures on carrier lands was $11,291,972.16, so that the total allocated property in Iowa equalled $69,861,810.16, or 25.79 per cent of all allocated property (Trans. 159). Determining the value of unallocated property on the basis of the percentage of allocated property would add $13,258,985.61, making the total valuation of complainant's property allocated and computed unallocated in Iowa $83,120,795.77 (Trans. 159).

There was introduced in evidence the protest filed with the Interstate Commerce Commission, Bureau of Valuation, to the tentative valuation report upon complainant's property by both complainant and the State of Iowa.

ASSIGNMENT OF ERRORS (31-466).

The Court erred:

(1) In denying to complainant the relief prayed for.

(2) In denying to complainant a temporary injunction restraining the defendants from certifying an illegal assessment of its property for the purpose of taxation.

(3) In denying to complainant a temporary injunction as prayed for, for the reason that the use of certification of the assessment made by the Executive Council of the State of Iowa of the property of complainant for the purpose of taxation results in an illegal discrimination as against the complainant, and is therefore illegal and void.

(4) In denying to complainant the temporary injunction prayed for, for the reason that under the evi-

dence adduced it was clearly shown that in all reasonable probability the complainant could and would sustain the allegation or allegations of its bill upon final hearing.

(5) In denying to complainant the temporary injunction prayed for under the evidence did not indulge a reasonable discretion.

(6) That the denial by the said court, so constituted under Section 266 of the Judicial Code, of a temporary injunction to complainant as prayed for, constituted an abuse of discretion.

(7) For the reason that the evidence adduced by complainant fully met the burden of proof imposed upon it by law.

(8) In denying to complainant a temporary injunction for the reason that the purported assessment if certified and utilized by defendants in the further steps provided by the statutes of the State of Iowa for the levying of taxes, will deprive complainant of its property without due process of law, and will deny to complainant the equal protection of the law, all contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

(9) In denying to complainant a temporary injunction for the reason that the purported assessment, if certified and utilized by defendants in the further steps provided by the statutes of the State, for the levying of taxes, will impose upon this complainant an undue and discriminatory portion of the tax burdens of the State contrary to the provisions of the Constitution of the State of Iowa, and particularly Section 6 of Article 1, and Section 2 of Article 8, of said Constitution, and contrary to the Fourteenth Amendment to the Constitution of the United States.

(10) In denying to this complainant a temporary injunction as prayed for the reason that complainant in order to avail itself of its rights under the law will be compelled to resort to many actions at law or in equity, and will be subjected to a multiplicity of suits.

(11) In denying to this complainant a temporary injunction as prayed for the reason that the actions of defendants in certifying or utilizing as the assessed value of complainant's property the sum of $30,400.00 per mile is violative of the provisions of Article VIII, Section 2 of the Constitution of the State of Iowa, and of Sections 1305, 1334, 1335 and 1336, of the Code of Iowa of 1897, as amended.

(12) In denying to this complainant a temporary injunction as prayed, for the reason that the act of defendants in certifying or utilizing as the assessment of the property of this complainant for the purpose of taxation the sum of $30,400.00 per mile, denies to this complainant the equal protection of the laws and is therefore contrary to and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

(13) In denying to this complainant a temporary injunction as prayed for the reason that by so doing the act of the defendants, so constituting the Executive Council of the State of Iowa, in certifying or utilizing as the assessment of the property of this complainant for the purpose of taxation the sum of $30,400.00 per mile is construed to be in accordance with Sections 1305, 1334, 1335, 1336, 1378, 1379 and 1382 of the Code of Iowa, as amended, and said sections when so construed are unconstitutional and void and contrary to and in contravention of the Fourteenth Amendment to the United States Constitution.

BRIEF OF THE ARGUMENT.

Jurisdiction.

The amount involved being in excess of $3,000.00, the claim of violation of rights under the Federal Constitution being in good faith, the showing being that a multiplicity of suits will result, that there is no adequate remedy at law; that a cloud will rest upon the title to complainant's property unless defendants are restrained as prayed for invests the court with jurisdiction.

Greene vs. L. & I. R. R. Co., 244 U. S. 499;
Greene vs. L. & N. R. R. Co., 244 U. S. 522;
Raymond vs. Chicago Union Traction Co., 207 U. S. 20;
C. M. & St. P. Ry. Co. vs. Kendall, et al., 278 Fed. 298;
Taylor vs. L. & N. R. R. Co., 88 Fed. 350.

Complainant has no Adequate Remedy at Law.

Section 1417 of the Code of Iowa provides:

> "The Board of Supervisors shall direct the Treasurer to refund to the taxpayer any tax, or portion thereof, found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

But this section is not applicable to the case of erroneous assessment made in the exercise of legal authority.

Harris vs. Fremont County, 63 Iowa, 639.

And such order may only be directed to the Treasurer in office.

Eyerly vs. Board of Supervisors, 81 Iowa, 189.

The statutes of Iowa are clear that the ultimate aim and requirement is that property, whether farm lands or railroad property, shall be assessed at full actual value.

Section 1305, Iowa Code Supplement 1913, and section 1336, Iowa Code of 1897.

The rate of taxation applicable to each of these classes of property is the same so that inequality of assessment results in inequality of taxation.

Section 1339, Code of Iowa of 1897.

Intentional, continuous and systematic assessment of farm lands comprising a substantial portion of the taxable property in Iowa at less than actual value being established, indeed admitted, complainant is entitled to have the assessment of its property based upon the same proportion of its actual value.

Iowa Cent. R. Co. vs. Board of Supervisors, 176 Iowa, 131;
Taylor vs. L. & N., Supra;
Green vs. L. & I. R. Co., Supra;
L. & N. R. Co. vs. Greene, Supra.

If the Executive Council in fixing the assessment of complainant's property proceeded in disregard of the provisions of the state statutes with respect thereto, then it proceeded upon a fundamentally erroneous principle.

L. & N. R. Co. vs. Greene, Supra.

Complainant was entitled by state statute to have earnings considered in determining its value.

Section 1334, Supplement to Code of Iowa, 1913;
Section 1336, Code of Iowa of 1897.

Earnings both gross and net are recognized by the decisions of the Iowa Supreme Court as not only proper but necessary considerations in the determination of value.

Marshalltown, etc. Co. vs. Wilker, 185 Iowa, 165;
City of Marion vs. C. R. & M. Ry., 120 Iowa, 259.

The value of stocks and bonds and the capitalization of income are recognized methods entitled to weight in the determination of the value of railroad property.

L. & N. R. Co. vs. Greene, 244 U. S. 522;
L. & N. R. Co. vs. Coulter, 131 Fed. 282;
Railroad Tax Cases, 92 U. S. 575.

The value of railway property is to be measured by the value of its use.

Monongahela Nav. Co. vs. U. S., 148 U. S. 312;
Cleveland, etc. Ry. vs. Backus, 154 U. S. 439;
Adams Exp. Co. vs. Ohio State Auditor, 166 U. S. 185.

ARGUMENT.

Jurisdiction.

The principles governing the invocation of the jurisdication of Federal Courts in cases of the character here involved have been so firmly established and often stated by this court that we deem it unnecessary to do more than call to the Court's attention the cases cited in the brief of the argument herein, as well as the facts disclosed by the statement of the case. It is most assuredly shown that there exists in this instance substantial and ample grounds for the exercise of jurisdiction by the court, and indeed the lower court so held.

In the resistance to complainant's application for a temporary injunction the defendants asserted the existence of an adequate remedy at law to which it was claimed the complainant should be remitted, but the fact, even if it may be conceded for the purpose of argument, that complainant might maintain separate actions in the several counties against the county officials to recover a

portion of the taxes when paid, would not afford an adequate remedy under the express and direct holding of this court in the recent case of *Wilson vs. Illinois Southern*, ... U. S. ...., so that we pass the question of jurisdiction with no further comment.

The Intentional, Habitual and Continuous Underassessment of Farm Lands Was Established on the Hearing.

The measure of the assessments of farm lands, and many other classes of property prescribed by the Iowa Statutes is not a matter of doubt. Such assessments are required to be at actual value, and actual value is defined to be value in the market in the ordinary course of trade. Section 1305, Supplement to Iowa Code, 1913.

Under the Iowa Statutes assessments of farm lands are made originally by local assessors. Statutory procedure is provided for the review of such assessments. Likewise the statutes provide for tribunals whose duty it is to equalize such assessments as between taxing districts and in the State at large. But after all of the various steps had been taken throughout a period of many years it is established by the proof in this record that there existed a state wide, continuous, habitual and substantial undervaluation of such farm lands, the extent of the undervaluation varying to some extent from year to year. We say that this result is established by the proof. The proof has been referred to in more or less detail in the statement of the facts herein, but it consists in the main of public documents, official admissions, testimony of members of the Executive Council of the State in years previous to that involved in this case, and direct and circumstantial evidence from private and public

sources, all unimpeached. Indeed a comparison of the evidence in this case with the reported decision of this court in *L. & N. vs. Greene*, 241 U. S. 522, and of the lower court, from which that appeal was taken, at 230 Fed. 227, will demonstrate the striking similarity of the evidence here and there, and the existence of a systematic and intentional undervaluation of farm lands. Indeed we think it necessary only to recall to this court its language in *L. & N. vs. Greene*, 241 U. S. at page 531, where it is said:

> "It is contended by the defendants that the evidence was insufficient to warrant the conclusion of the learned district judge that in fact property in general in the State of Kentucky was systematically undervalued. A similar question of fact was involved in *Coulter vs. Louisville & N. R. Co.*, and this court (p. 609) held the evidence to be insufficient. In the present case, besides much to the same effect as that presented in the *Coulter* case, a mass of additional evidence was introduced, including extracts from the United States census report for the year 1910, reports of the State Board of Equalization for the years, 1910, 1911, 1912 and 1913; report of the State Tax Commission of 1913; testimony of a member of the State Board of Equalization who served in the years 1908 to 1911, inclusive; affidavits of nearly 200 individuals from 47 counties; in different parts of the state; and much besides. The evidence is too voluminous to be adequately reviewed within reasonable limits of space, and we content ourselves with saying that it comprises a body of official admissions and direct and circumstantial evidence from private and public sources that are unimpeached, fully sustaining the finding of the trial court that the great mass of property in the state, so far as assessed by the county assessors under the review of the county boards of supervisors and the State Board of Equalization,—and this embraces all tangible property except railroad property and distilled spirits,—during a period of years prior to and in-

cluding the year 1913, was intentionally, systematically, and notoriously assessed far below its actual value, and at certainly not exceeding 60 per cent of its fair cash value. There is little to the contract except the general presumptions arising from the statutory duty of assessors to assess at fair cash value and from the oath customarily required of individual taxpayers, and a large number of stereotyped affidavits made by former assessors to the effect that they endeavored to follow the law and assess all property at its fair cash value, and if any property was otherwise assessed it was unintentional, and not pursuant to any agreement between the assessor and the taxpayer." In our judgment this does not materially detract from the convincing effect of plaintiff's proofs. The evidence is analyzed briefly in the opinion of the district judge (230 Fed. 227-231), and nothing more need to be added to his comments upon it."

Moreover by stipulation in this record the average value of farm lands in Iowa on January 1, 1922, was fixed at $125.00, while the average assessment of such lands is shown to have been $76.63 per acre. It therefore is established that the assessment of farm lands was at the rate of only 61.3 per cent of actual value in the year involved in this proceeding. That such fact was known to the Executive Council of the State of Iowa when it came to make the assessment of the property of complainant cannot be denied. Indeed in the oral argument of this case counsel for defendants so admitted.

We have then at the outset in this case as an established fact that at the time of the assessment involved, and for years prior thereto, there had been a systematic, continuous and habitual disregard of the positive provisions of the Iowa Statutes and undervaluation of farm lands in the assessment thereof for the purposes of taxation. So far as farm lands are concerned we do not have

a sporadic case of underassessment, but a condition and result shown by direct and circumstantial facts and admissions to have existed and to have been so notorious for such a period as to in legal effect constitute a system. It follows we think without question that in so far as the assessment of farm lands is concerned such assessment was tinged with a legal fraud. Surely there had been a violation of the positive provisions of the statutes, and such violation had continued for such a length of time as to constitute a system, and such violation was notorious to the extent that investigations conducted by the State and its agents and published at large, asserted the existence of the disregard of the statutory provisions. What more is required to show the existence of a legal fraud in the administration of the tax laws of the State? Surely in similar cases where relief has been granted, citations to which are included in our brief of authorities, no more proof has been adduced.

Now assuming the existence of such legal fraud with respect to the assessment of a substantial body of taxable property in the State, and assuming also the continuity, the intent, the habit, and the notoriety with respect to such legal fraud, is more than a resulting damage required to be proved in order to accord relief to one impressed with a greater proportion of the tax burden? Does good faith alone on the part of other taxing officials in the administration of their offices avoid the right to relief as against such continuous, systematic and habitual discrimination? Does not the fact that the damage is sustained in and of itself in connection with the proof of the existence of the legal fraud in the taxation of such a substantial body of property afford not only the basis, but the occasion for the interposition of the power of a court of equity to relieve against such discrimination?

That such must be the case seems to us beyond question. Suppose in this case the Executive Council of the State of Iowa had performed its duty in accordance with the strict statutory requirements, and had therefore assessed the property of the Railway at actual value, could there have been a charge of bad faith as against the Executive Council? Is compliance with the letter of the law the occasion for a conviction of bad faith? But would such a condition, however honest and earnest the Executive Council may have been in its effort to accurately determine the actual value of the property of the Railway, deprive the railway as a taxpayer from relief against the undue burden cast upon it not by reason of the act of the Executive Council but by reason of the intentional undervaluation of the other class of property by the assessors who had the obligation to assess? And would not the very fact of such discrimination give rise to a right to relief?

The systematic and intentional undervaluation of one class of property, necessarily produces a discrimination against another class of property which is not accorded the same treatment; the owner of the last mentioned class of property is entitled to equitable relief because of that discrimination, and he does not have to show that the officials who assessed his property did not exercise an honest judgment; all he need show is the intentional undervaluation of the one class of property and the *simple fact* that his property was not assessed on the same basis.

The reason for this is simple, and is fully sustained by the authorities. Where state officers, charged with the duty of assessing property at its *full value*, intentionally and systematically assess it for less than such full value, they have violated the law; that violation in itself

throws an illegal burden and exaction upon the taxpayer whose property is not thus assessed; the illegal action operates against, and affects the taxing system of the state as a whole, and the aggrieved taxpayer, affected by such discrimination practiced in favor of another class of property, is entitled to equitable relief even though the officials who assessed his property fully obeyed the law.

The correctness of our claim is demonstrated by those cases where there were two different sets of assessing officials, acting independently, one of which intentionally and systematically undervalued the property under their jurisdiction, while the other did not. Relief was granted in those cases to complainants who owned property subject to the jurisdiction of the last mentioned authorities. Such relief could not have been granted had those complainants been required to prove not only the wrongful action of the authorities who undervalued the one class of property, but also to prove similar wrongful action by the authorities who assessed complainant's property; in these cases it was not alleged or proved that the last mentioned public authorities had acted illegally or fraudulently.

The *Greene* cases, 211 U. S. 499 and following, are excellent examples. There the assessment complained of was made by a State Board of Valuation and Assessment; real and personal property was assessed by county assessors subject to the review of county boards of supervisors and a State Board of Realization. The bill in *Greene v. Louisville & Interurban Railroad Company* alleged (p. 502) that complainant was assessed by defendants, constituting the Board of Valuation and Assessment "on the basis of 75% of actual values, while taxable property in general was assessed *systematically* and *intention-*

ally at not more than 52% of actual values." And again (p. 504):

> "Plaintiff avers that for many years past, including the taxing year 1914-1915, the taxes for which are here in controversy, *the local assessors and other assessing officers of the State of Kentucky have habitually, intentionally, systematically, and generally assessed the property of individuals and of corporations within their sphere of duty*, comprising 80 per cent of the total taxable property, at not exceeding 52 per cent. of its fair cash value, estimated at the price which it would bring at a fair and voluntary sale; that the fact of such systematic assessment upon that basis annually for many years past has been a matter of public notoriety in the State; 'whereas the said Bosworth, Rhea and Crecilius, acting as the State Board of Valuation and Assessment, after ascertaining what, in their judgment, was the fair cash value of plaintiff's capital stock, reduced said value only to the extent of taking 75 per cent. thereof, instead of taking 52 per cent, the average rate applied by assessing officers to the *vast body of property* in this State.'"

It will be noted there are here no averments of any systematic or intentional failure to equalize on the part of the defendants, but the intentional and systematic action complained of was simply on the part of the *local assessors*, etc. The court said:

> "The entire argument for defendants proceeds upon the theory that the Board of Valuation and Assessment *treated all taxpayers alike* over whom they had jurisdiction; hence, it is fair to assume that plaintiffs' franchises were assessed on the same basis of valuation applied by the Board to other property generally that came within the range of their official duty." (p. 506).

The above quotation shows that the Board of Valuation and Assessment had in itself practiced no discrimination between the various classes of property that came before it for assessment. It was admitted that the vast body of property in the state was intentionally assessed at only 52%. The court then said:

> "Is discriminatory taxation, contravening the express requirements of the state constitution, beyond redress in the courts of the United States, their jurisdiction being properly invoked, when the discrimination results from divergent action by different assessing boards whose assessments are not subject to any process of equalization etablished by the State, and where the diverse results are the outcome, not, indeed, of any express agreement among the officials concerned, but of intentional, systematic, and persistent undervaluation by one body of officials, presumably known to and ignored by the other body, so that in effect the two bodies act in concert? In our opinion, the answer must be in the negative."

The Kentucky Constitution and Statutes are substantially like those of Iowa:

Kentucky.	*Iowa.*
(p. 509) "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property."	"The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals. (Constitution, Art. VIII Sec. 2.)
"All property * * * shall be assessed for taxation at its fair cash value,	"All property subject to taxation shall be valued at its current value, * * *

estimated at the price it would bring at a fair voluntary sale." (p. 508)

Actual value of property shall mean its value in the market in the ordinary course of trade." Sec. 1305, Code 1897.

The court said (p. 516):

> "Therefore, the principal, if not the sole reason for adopting "fair cash value" as the standard for valuations, is as a convenient means to an end—the end being equal taxation."

It continued:

> "But if the standard be systematically departed from with respect to certain classes of property, while applied as to other property, it does not serve but frustrates the very object it was designed to accomplish. It follows that the duty to assess at full value cannot be supreme in all cases, but must yield where necessary to avoid defeating its own purpose."

In the companion case, *L. & N. v. Greene*, 244 U. S. 522, the court summarized the bill of complaint as follows:

> "A chief ground of complaint, based upon the equal protection provision of the Fourteenth Amendment, and also upon the requirement of equal taxation prescribed by 171, 172 and 174 of the state constitution, was that the plaintiff had been subjected to illegal discrimination, in that its property had been assessed at more than its actual value, whereas the property *of all other taxpayers in the State was assessed uniformly and intentionally* at much less than actual value, in fact at not exceeding 60 per cent."

It will be noted here that the allegation with respect to intentional under-valuation is made solely with re-

spect to "property of all other taxpayers in this State." With respect to the *proof* the court said (p. 531):

> "It is contended by defendants that the evidence was insufficient to warrant the conclusion of the learned District Judge that in fact *property in general* in the State of Kentucky was systematically undervalued."

No claim was made of any *systematic or intentional* action with respect to complainant's property.

Upon the contention last quoted, the court said (p. 532):

> "The evidence is too voluminous to be adequately reviewed within reasonable limits of space, and we content ourselves with saying that it comprises a body of official admissions and direct and circumstantial evidence from private and public sources that are unimpeached, fully sustaining the finding of the trial court that *the great mass of property* in the State, so far as assessed by the county assessors under the review of the county boards of supervisors and the State Board of Equalization—and this embraces all tangible property except railroad property and distilled spirits—during a period of years prior to and including the year 1913, was intentionally, systematically, and notoriously assessed far below its actual value, and at certainly not exceeding 60 per cent of its fair cash value."

Thus the bill of complaint, the evidence in support thereof, and the defense thereto, were all directed solely to the intentional and systematic under-assessment of the great mass of property in the state.

Another late case is *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, wherein the court said:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that *intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.*"

The underscored provision shows clearly that the illegal intention and system need exist with respect only to one class of property, and need not exist with respect to the taxpayer who has been taxed upon the full value of his property.

The above language is quoted approvingly by Chief Justice Taft in *Sioux City Bridge Co. v. Dakota County Nebraska*, 260 U. S. 441 (1923), and he says:

> "Analogous cases are *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 516, 517, 518; *Cummings v. National Bank*, 101 U. S. 153, 160; *Taylor v. Louisville & Nashville R. R. Co.*, 88 Fed. 350, 364, 365, 372, 374; *Louisville & Nashville R. R. Co. v. Bosworth*, 209 Fed. 380, 452; *Washington Water Power Co. v. Kootenai County*, 270 Fed. 369, 374."

One of the leading cases is *Taylor v. L. & N.*, 88 Fed. 350, decided by the Circuit Court of Appeals, composed of Judges Taft, Lurton and Severens., opinion by Taft, J. This case has frequently been cited with approval by the Supreme Court of the United States, for example, in the *Greene* cases, at pp. 516 and 529, where it is extensively quoted from; *Sioux City Bridge* Case, p. 446; *Johnson v. Wells Fargo Co.*, 239 U. S. 234.

The *Taylor* case involved assessments made by the State of Tennessee, in which state real and personal property was assessed for taxation by one board and railroad property by another. Upon the point under discussion Judge Taft said (p. 361):

> "The next objection to the assessment of the defendants, and the most serious, is that they have assessed the railroad property of the state, including that of complainant, at its real value, whereas all other property of the state is habitually and intentionally assessed by the assessing officers, who are not the defendants, at not exceeding 75 per cent of its real or correct value."

Judge Taft thereupon referred to the Tennessee statutes which required each of the two boards to assess property within their respective spheres at its "real value." He continued:

> "The contention for the complainant is that the undervaluation of real and personal property is intentional and systematic throughout the state, and is in accordance with an immemorial and well-recognized custom; that, combined with the assessment at full value of all railroad property makes a system of taxation operating to impose upon complainant, and all other holding the same class of property, a grossly unjust share of the cost of the state, county, and city governments; that this is in violation of the constitution of the state of Tennessee, which enjoins uniformity of taxation, according to value, on all property, and expressly forbids that one species of property shall be taxed higher than any other."

Here, again, the contention is limited to an intentional and systematic under-valuation of property by a board who were not defendants to the case; and there

was no contention that the board which assessed complainant's property had acted wrongfully in respect of its own duty.

Likewise from Judge Taft's statement of the evidence it can be seen that it was limited to the systematic undervaluation by the local assessors and other county officials. The court then continued:

> "We have before us a case in which the complaining taxpayer, and other taxpayers owning the same species of property are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination, but by the intentional and systematic disregard of the law by those charged with the *duty of assessing all other species of property* than that owned by complainant and its fellows of the same class." (381)

After an examination of the authorities the court continues:

> "We have already found, from the evidence, that that there is an intentional undervaluation of property in each county, and that this is uniform as to all real and personal property, and results from a clear understanding between the assessors and county boards of equalization, who have a common motive for the reduction." (371)

We call the Court's particular attention to the following language:

> "Now, it is true, that before equity will relieve in such a case, it must appear that the assessing officers whose acts of undervaluation create the unjust burden must intentionally and habitually violate the law, by assessing property at a less valuation than that which they know to be its true value; but it is not true that they must be shown affirmatively to

intend to injure complainant and his class of taxpayers in so doing. It is true that in the *Cummings* Case the unfaithful assessors, or some of them, did undervalue both real and personal property, and money capital, in which were included bank shares, at different percentages of their true value; but the assessment of which complaint was made was not the work of these assessors at all, but, as here, of a state board of equalization. An intentional undervaluation of a large class of property, when the law enjoins assessment at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law." (372)

The court then refers to the rule that equitable relief does not lie where the injury complained of arises only from the erroneous but honest judgment of the tax tribunal. How then could the court give relief to the complainant in that case where it was admitted that the State Board which had assessed its property had not by intention, design or otherwise, done any illegal act? The answer is given as follows by the court:

"The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully-assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination."

In Iowa, farm lands are assessed initially by local assessors, whose action is in certain respects, subject to review by the Executive Council as a State Board of Equalization. The Executive Council, pursuant to entirely different statutory authority, is the original assessing body of railroad property. If the Executive Council be considered as two separate assessing authorities—one with respect to farm lands and another with respect to railroads—the situation is the same as that revealed by the above cases, in which there were two separate boards, one for railroads and one for other property generally, except that in Iowa the two boards had the same personnel. But even if the Executive Council be considered as a single body with a single jurisdiction, the principle is not different as is shown by the following excerpt from *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, 512:

> "It is hardly open to serious dispute that if the legislature had confided to a single body the determination of the basis of assessment of the real estate and personal property of individuals and non-franchise corporations, on the one hand, and of the tangible and intangible property of public service corporation, on the other, a valuation of property of the latter class on the basis of 75 per cent of its actual value, while property of the former class was assessed systematically at 52 per cent, or not more than 60 per cent, of its actual value, would be inconsistent with the sections we have quoted from the Kentucky Constitution."

We submit that the evidence in this record clearly shows the fact to be that by the assessment made complainant is subjected to a greater proportion of the tax burden than is true as to farm lands on the average.

The record includes evidence of the value of the carrier property of the complainant upon numerous bases.

The first basis is that of the par value of its stocks and bonds, the second that of the market value of its stocks and bonds. That such bases are proper for consideration in the determination of the ultimate question of value, we think demonstrated by decisions of many courts, including the decisions of this court.

In *L. & N. R. Co. vs. Greene*, 244 U. S. 522, in speaking to this question this court said:

> "In such cases there are (at least) two recognized methods known as the stock and bond plan, and the capitalization of income plan. In the present case the latter was followed."

The use of the value of stocks and bonds as a measure of value for purposes of taxation, or at least as a method worthy of consideration in arriving at such value, is recognized also in the decisions in *Railroad Tax Cases*, 92 U. S. 575, and *L. & N. R. Co. vs. Coulter*, 131 Fed. 282.

The next basis presented by complainant is that of the capitalization of its net railway operating income over a period of five years next preceding the assessment, (such period being chosen as a representative or normal period of operation), at the rate of six and seven per cent respectively, (such percentages being presented on the theory that they constituted a reasonable measure of a fair return upon the value of the property employed in such common carrier business).

That such basis is not only proper but necessary for consideration in the determination of the ultimate question of value is demonstrated, by the provisions of the Iowa statutes. See Section 1331, Supplement to the Code of 1913, which provides that "for the purpose of making

such assessment", the railway is required to furnish a statement of its gross earnings, its operating expenses and its net earnings, and Section 1340-a and c of the 1913 Supplement to the Code of Iowa which prescribes the method of computation of gross and net earnings.

By Section 1336 of the Code of Iowa of 1897, the Executive Council is required to take into consideration in making such assessment the gross earnings of the railway, and likewise is required to apportion the value of rolling stock and movable property on the basis of the "business" done in the State and out of the State.

Earnings, both gross and net, are recognized by the decisions of the Iowa Supreme Court as not only proper but necessary considerations in the determination of value.

Marshalltown, etc. Ry. vs. Wilker, 185 Iowa, 165;
City of Marion vs. C. R. & M. Ry., 120 Iowa, 259.

Complainant next presented as a method for consideration in the determination of the value of its property the capitalization of the rental paid to it for the use of its property by the government. That such method is a proper one is demonstrated by numerous decisions of this court, among which are the following:

Monongahela Nav. Co. v. U. S., 148 U. S. 312;
Cleveland etc. Ry. v. Backus, 154 U. S. 439;
Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185.

Complainant presented also a basis for consideration in the determination of the ultimate question of value its property investment account as reported to the Interstate Commerce Commission in the proceeding known as *Ex Parte* 74, and as adjusted in that proceeding for the carriers in the western group.

All of these bases were of the value of the carrier property of the complainant as a system. Its system extends into fourteen states. It was necessary therefore to apportion to the State of Iowa that value, and in order so to do complainant presented ratios for apportionment based upon, first, gross earnings in the State of Iowa and outside of the State of Iowa. This basis was presented because of the statutory requirements hereinbefore referred to. It next presented the ratio determined by the net earnings in the State of Iowa as compared to the net earnings outside of the State of Iowa. This basis was presented because of the requirement of Section 1334 of the Supplement to the Code of Iowa of 1913, that for the purpose of making such assessment complainant should report such fact. It next presented the ratio determined by the miles of road operated in the state of Iowa as compared to the miles of road on the system as a whole, which likewise was required to be reported for the purpose of making such assessment by the same section of the Iowa Code, and such is true with respect to the ratio of the miles of track operated in and out of the state.

Complainant presented additional ratios based upon transportation train miles in the State and on the system as a whole, and traffic units, being number of passengers carried one mile and tons of freight moving one mile in and out of the State as a measure of the business done, since under the statutes of Iowa property used both in and out of the state is required to be apportioned on the basis of the business in and out of the State.

Upon the composite ratio derived by a consideration of all of these bases, the value of the property of complainant in the State was determined and shown by the exhibits to complainant's Exhibit "11", and on no one of

the bases of value so apportioned did the assessment of its property approximate the basis of 61.3 per cent of actual value, at which farm lands were assessed.

Therefore taking into account the bases specified by the statutes of the State of Iowa for the purpose of apportionment, and taking into account the recognized methods for the determination of the value of railway property, there was in every instance a showing of substantial discrimination as a matter of fact in the imposition of the tax burden upon complainant when compared to farm lands.

It is true the defendants on the hearing presented as Exhibit "A-1" (Trans. 177) certain correspondence between the Board of Railroad Commissioners of the State of Iowa and a Vice-President of complainant. It will be noted that the subject matter of this correspondence was the investment in road and equipment of the complainant for the State of Iowa, and the correspondence on its face shows that the statement was of the claim made by the railway in connection with the valuation of its property by the Bureau of Valuation of the Interstate Commerce Commission. A comparison of this statement with the tentative valuation report (Trans. 314-458) will demonstrate that the claim of complainant so made was not allowed. Indeed defendants introduced the protest of complainant filed in that proceeding. Bearing in mind the nature of the hearing, the fact that the evidence was upon affidavits and documents, that no opportunity of cross examination or explanation was offered, the purpose for which the statement was given being in answer to an inquiry asking for certain information, the nature of the data disclosed by the statement, can it be said that such statement would afford a basis for hold-

ing that upon the final hearing in the case the probabilities were that complainant would not prevail?

Furthermore, while costs either of original construction or of reproduction at any given date might be competent as evidence upon the issue of value for some purposes, it certainly could not be taken as the controlling factor in the determination of the question in this case because so to do would be to ignore the requirements of the Iowa Statutes heretofore referred to.

The same observations are applicable to the tentative valuation report offered as Exhibit "X" by defendants, and likewise the report of the Board of Directors to the stockholders of complainant of January 7, 1922, offered as complainant's Exhibit "C", is subject to the same considerations.

It is earnestly submitted that this record discloses a state of facts which presented a case proper for the investigation of the court on the final hearing, and that to preserve the *status quo* a preliminary injunction should have been awarded.

THE ASSESSMENT OF COMPLAINANT'S PROPERTY, IF SUSTAINED ON THE GROUNDS DISCLOSED BY THE OPINION OF THE LOWER COURT, RESULTED FROM THE EMPLOYMENT OF ERRONEOUS PRINCIPLES, OR THE DISREGARD OF RIGHTS SECURED TO COMPLAINANT BY THE IOWA LAWS.

The opinion of the lower court appears at page 21 of the transcript. With respect to the assessment of complainant's property the court says that the Executive Council "may also have used any of the suggested methods of allocation so long as it included therein the requirements of the Iowa Statute that it consider gross

earnings and the relative proportion of state and interstate business", and with reference to complainant's evidence states: "However, this affidavit contains no information as to gross earnings."

The court in this statement has clearly erred, as is disclosed by complainant's Exhibit 11 (Trans. 131 and 132), where the term railway operating revenues as used in the exhibits is clearly defined and constitutes gross earnings.

The opinion recognizes the requirement of the Iowa Statutes that in the making of the assessment the Executive Council of Iowa is required to consider gross earnings, and also the relative proportion of state and interstate business. We have already called to the attention of the court the provisions of the various statutes providing for the consideration of these factors in the making of the assessment.

If, in order to sustain the assessment against the charge of discrimination as made by the bill, a method of assessment which disregards the right of the complainant under the Iowa Statutes referred to to have considered its gross earnings and the relative proportion of state and interstate business in the making thereof, is adopted, then by virtue of the adoption of such method the assessment is void and the complainant entitled to relief.

In speaking to this question this court in *Louisville & Nashville R. Co. vs. Greene*, 241 U. S. at page 536, said:

> "The findings of an official body such as the Board of Valuation and Assessment, made—as was the case here—after a hearing and upon notice to the taxpayer, are *quasi* judicial in their character, and are not to be set aside or disregarded by the courts unless it is made to appear that the body pro-

ceeded upon an erroneous principle or adopted an improper mode of estimating the value of the franchise, or unless fraud appears. *Pittsburg, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 435, 436, 38 L. Ed. 1031, 1039, 1040, 14 Sup. Ct. Rep. 1114; *Chicago B. & Q. R. Co. v. Babcock*, 204 U. S. 585, 596, 51 L. Ed. 636, 639, 27 Sup. Ct. Rep. 326. In this case there is no showing of fraud, the contention being that the Board departed from the mode prescribed by the statute. If they did this, or if they proceeded in disregard of rights secured to the taxpayer by the state or Federal Constitution, of course they proceeded upon an erroneous principle. *Henderson Bridge Co. v. Com.*, 99 Ky. 623, 645, 29 L. R. A. 73, 31 S. W. 486; *Hager v. American Surety Co.*, 121 Ky. 791, 800, 90 S. W. 550."

Now let us examine the opinion and order of the court denying complainant's application for a temporary injunction. In said opinion it is said: (Trans. 29.)

> "In the above annual report to the stockholders, for 1921, the statement is made, and supported by figures, that the physical property of the company, as a going concern, exceeds the par value of the outstanding stocks and bonds. This par value is given, in that report, as slightly over $362,000,000.00. If that be allocated on the mileage basis for 1921 of 29.81% (being one of the methods suggested by this complainant) the Iowa value is something over $107,000,000.00. To this the assessed value is 61 plus % as against 61 plus % for farm lands.
>
> In view of the above possible findings, based on evidence before it, we cannot say that the Council intentionally overassessed the property."

Let us suppose that the Executive Council had taken the statement in the report to complainant's stockholders of the physical value of the complainant's property as a measure of its value for the purpose of taxation; let us

suppose further that the Executive Council had allocated that value on the mileage basis for the year 1921, just as the court says it might have done, would not such method have contravened the express provisions of the Iowa Statutes? Certainly included in the value, whatever the sum, was some quantity of money represented by the rolling stock and movable property, which is under the statute specifically required to be apportioned to the business in and out of the State and not upon a mileage basis. Furthermore by the adoption of some estimate of physical value, or cost, either original or reproduction new, there is an utter disregard of the provision of the statute that the gross earnings of complainant shall be considered in the making of the assessment. Now if the Executive Council had adopted the method referred to in the above quotation from the opinion of the court, surely its action in that respect would have been subject to the charge that it had disregarded a right secured to the taxpayer by the state law, or had employed an erroneous principle, or adopted an improper mode of esti mating the value of the property, and under the clearly established rule complainant would be entitled to relief from such an assessment.

Now if the assessment cannot be sustained on the basis suggested because of the adoption of an improper method, then the employment of such method by the court as a reason for denying to complainant the temporary injunction prayed demonstrates the failure to exercise the sound legal discretion with which the court was invested in the determination of the issue then before it.

It is further stated in the opinion of the court below that "the above protest filed by the company with the Interstate Commerce Commission claimed a system

value of not less than $525,000,000.00. From this amount a most liberal deduction for included items not properly to be considered in tax values within the state of Iowa would leave a figure which, allocated by any reasonable method suggested, would apportion to Iowa at least $100,000,000.00. The assessed value would be 60% thereon as compared with 61 plus % for farm lands. Such narrow difference of percentage might well honestly occur and is slight evidence of fraud." The protest was of a finding of physical value. Neither the protest nor the finding of physical value involved the consideration of gross earnings or business, or of the other factors, which are required by the statutes of the State of Iowa to be considered by the Executive Council in the making of railway assessments, so that to predicate an assessment upon such protest under the circumstances stated would be to disregard the rights secured to the taxpayer by the state law, or would be the employment of an erroneous principle, or the adoption of an improper mode of estimating the value of the property, and this being true, the lower court in basing its conclusion upon such a ground did not indulge the sound legal discretion which it should have indulged in the determination of the issue presented to it.

The same observation is equally applicable to the employment of the statement made by the Vice President of complainant to the Board of Railroad Commissioners of the State concerning the investment in road and equipment as reported to the Interstate Commerce Commission which, as we have heretofore shown, was a statment of cost based on reproduction new, and was a statement which had, as a matter of fact, not been allowed by the Interstate Commerce Commission. The employ-

ment of such a basis is contrary to the statutes, and would result in absolutely ignoring certain positive provisions of the statutes concerning the making of assessments of railway property, and for the same reason would be the equivalent of the employment of an erroneous principle, or the adoption of an improper mode, and the court below in basing its conclusion upon such ground did not employ the sound legal discretion required in the determination of the issue, and so it may be said with respect to each and all of the specific considerations shown by the opinion of the lower court to have been indulged in reaching its conclusion.

Therefore we insist that in denying to complainant the relief asked the court has justified the action of the Executive Council of the State of Iowa upon grounds which disclose a procedure in disregard of the provisions of the State Statutes with respect to the making of assessments, and has therefore predicated its conclusion upon fundamentally erroneous principles.

Surely an order based upon considerations such as disclosed by this opinion cannot be said to have resulted from the employment of the sound legal discretion required.

We therefore earnestly submit that the action of the trial court should be reversed.

Respectfully submitted,

J. G. GAMBLE,

Counsel for Appellant.

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